

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.9332 OF 1995 .

Date of decision: April 20, 1998.

GULAM KADAR AHMADBHAI MEMON & ORS.... Petitioners
Versus
SURAT MUNICIPAL CORPORATION. Respondents.

For approval and signatures:

The Hon'ble Mr. JUSTICE R.A.MEHTA.

The Hon'ble MR. JUSTICE M.S.SHAH

1. Whether Reporters of Local Papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment ?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge ?

Appearance:

MR HM MEHTA SR. ADVOCATE WITH MR.KETAN A DAVE,ADVOCATE for Petitioners.

MR GN DESAI SR.ADVOCATE WITH MR.PRASHANT G DESAI, ADVOCATE for respondents nos. 1 and 2.

MR MB FAROOQUI,ADVOCATE for Respondent Nos. 3 and 4

CORAM : R.A. MEHTA & M.S.SHAH JJ.

April 20, 1998.

This public interest petition under Article 226 of the Constitution challenges the constitutional validity of provisions of Section 212 of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as the BMC Act or 'the Act') on the touch stone of Articles 25 and 26 of the Constitution of India and also challenges the orders dated 7th October 1995 (Annexures C and D to the petition) requiring the trustees of the Trusts managing Mohammad Arif Minara Masjid and Golwali alias Halkara Masjid in Surat to demolish and remove a part of the aforesaid two mosques for clearing the road line as set under the provisions of section 212 of the Act.

2. Initially the petition was mainly filed against Surat Municipal Corporation (hereinafter referred to as the Corporation). Subsequently the Trustees of the aforesaid two Trusts managing the aforesaid mosques were added as respondents in order to decide the controversy involved in this petition completely and effectually. Notice was issued by this Court and ad interim relief was granted directing the respondents to maintain status quo. In response to the notice affidavit-in-reply was filed on behalf of the respondent-Corporation. In view of the amendment of the petition the respondents filed further affidavit-in-reply. Thereafter rejoinder Affidavits by the petitioner and surrejoinder affidavit on behalf of the respondents have been filed. With the consent of the learned counsel for all the parties, the petition was heard for final disposal.

3. The facts leading to the filing of the present petition, briefly stated, are as under:

3.1. Mohammad Arif Minara Masjid (popularly known and hereinafter referred to as the Minarawali Masjid) and Golwali alias Halkara Masjid (popularly known and hereinafter referred to as the Golwali Masjid) are situate on the Bhagal main road in the city of Surat. Minarawali Masjid is managed by Mohammad Arif Minara Masjid Trust a wakf which is registered as a Public Trust under the Bombay Public Trusts Act 1950. According to the petitioners, the said mosque was existing even in the year 1867 when the Collector, Surat issued a Sanad in respect of the mosque to the then mutawali thereof. Golwali masjid is managed by another wakf Golwali alias Halkara Masjid Trust, which is also registered as a public trust under the aforesaid Act of 1950.

3.2. Under the provisions of the Gujarat Town Planning Act, 1976 (hereinafter referred to as the TP Act), the Surat Urban Development Authority (SUDA) has been constituted for preparing the development plans for Surat Urban Area. The SUDA prepared a development plan for the area including the Bhagal main road and certain other areas of Surat city. The Corporation had issued a public notice on 9th November 1988 inviting objections against the draft development plan which also included the provision for widening of Bhagal main road on which the aforesaid two mosques abut. After considering the objections, the Standing Committee of the Municipal Corporation passed a Resolution on 20th May 1989 under Section 210 of the BPMC Act prescribing a fresh road line in substitution of the existing road line. The said fresh road line is now called regular line of the street. As per the said sanctioned development plan in place of the existing 40' wide road line, 60' wide regular line of the street was provided on the aforesaid site in question which is on a junction of five roads.

3.3. Respondent no.2 i.e. the Director of Planning, of the Corporation issued notices dated 7th September 1995 under the provisions of sub-section (1A) of Section 212 of the BPMC Act calling upon the trustees of the aforesaid two mosques to demolish and remove a portion of the respective mosques so as to fall in line with the sanctioned regular road line; as per the plan sanctioned in the year 1989. The trustees of the aforesaid two wakfs lodged their objections including the objections to the effect that the properties in question being religious properties should be excluded from road line and that there was no need to acquire the said properties and further that there was no need to widen the road. The Standing Committee of the Corporation passed Resolution dated 5th October 1995 rejecting the said objections and thereupon by orders dated 7th October 1995 (Annexures C and D to the petition), respondent no.2 called upon the trustees of the said two mosques to remove the demarcated portion of the aforesaid two mosques.

3.4. Both the above orders dated 7th October 1995 are challenged in the present petition.

4. Mr.H.M.Mehta, learned Counsel for the petitioners raised the following contentions at the hearing.

- (1) The provisions of Section 212 of the BPMC Act are violative of Articles 25 and 26 of the Constitution in so far as they purport to be

applicable to the places of religious worship;

(2) The impugned orders are violative of the provisions of the Places of Worship (Special Provisions) Act 1991;

(3). The impugned orders are also violative of the Resolution dated 3rd May 1951 which was passed by the Standing Committee of Corporation specifically providing that places of worship like temples, mosques , etc. shall be excluded from road line;

(4). The Corporation has failed to follow the required procedure before passing the order under Section 212 of the BPMC Act.

(5). The impugned orders are also discriminatory in as much as the Corporation has accorded favorable consideration to Hindu religious places in the context of street alignment but has failed to adopt a similar constructive and beneficial approach in respect of the aforesaid mosques.

5. In reply to the above contentions, Mr.G.N. Desai, learned Counsel appearing for the respondent Municipal Corporation had submitted as under:

(a). The constitutional validity of the provisions of section 212 of the BPMC Act has already been upheld by the Hon'ble Supreme Court in the case of the Municipal Corporation of the City of Ahmedabad and Ors. Vs. The State of Gujarat and anr., AIR 1972 SC 1730 and by a Division Bench of this Court in Special Civil Application No. 1454 of 1965 and other cognate matters decided on December 13, 1972.

(b). The provisions of the Places of Worship (Special Provisions) Act, 1991 are not applicable in the instant case.

(c). The resolution dated 3rd May 1951 was a one time resolution passed by the then Municipality dealing with the traffic situation then prevailing.

(d). The road is being widened from 40' to 60'as per the sanctioned development plan which was

prepared as per the provisions of the Gujarat Town Planning and Urban Development Act, 1976 and also as per the road line sanctioned under section 212 of the BPMC Act. The development plan was sanctioned as far back as in 1986. The road line was sanctioned in the year 1989. The present petition filed in November 1995 therefore, suffers from gross delay, laches and acquiesce.

(e). Since the road is being widened as per the aforesaid sanctioned road line, the petitioners have no right to challenge the impugned orders dated 7th October 1995 as the same are merely consequential orders on the basis of the development plan sanctioned in the year 1986 and the road line sanctioned in the year 1989. The petitioners have not challenged either the development plan or the decision taken in the year 1989 for the aforesaid street alignment.

(f). The impugned orders were passed after following the procedure prescribed by law including consideration of objections against the proposed road line in 1989 under section 210 of the Act and after following the procedure under section 212 of the Act in the Year 1995.

(g). The two mosques are situate on the Bhagal main road which is a highly congested area. Parts of the two mosques and surrounding areas like shops belonging to and let out by respondents Nos. 3 and 4 were situate on traffic bottle necks on a junction of five busy roads.

(h). The allegations of discrimination are baseless as many mosques and Dargahs were given relaxation at the time of road alignment but since these two mosques are situate on a bottle neck on the junction of five roads, some portions of the mosques are required to be removed in public interest. Many of the temples are being removed from the main road; for instance, on Una Pani Road there are five temples which are coming within the road line and the Corporation is considering to remove them. If the religious places are on roads not having heavy traffic, different consideration would arise. However, in the instant case in view of the increase in the population and in the traffic, it is necessary to widen the road to solve the traffic problem in

public interest.

6. We will first examine contention nos.2 to 4 urged on behalf of the petitioners because if any one of them is upheld, it may not be necessary to examine other wider questions. We will consider Mr.Desai's preliminary contentions (d) and (e) alongwith the first and fifth contentions of Mr.Mehta.

CONTENTION NO. 2.

7. As far as the contention of Mr.Mehta based on the provisions of the Places of Worship (Special Provisions) Act, 1991 is concerned it is not available to the petitioners because what the aforesaid Act prohibits is conversion of any place of worship of any religious denomination into a place of worship of another religious denomination. It does not prohibit the State from acquiring any place of worship or any part thereof for a public purpose such as acquisition of property for widening the road. Section 3 of the said Act reads as under:

"3. Bar of conversion of places of worship. No person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof."

In the instant case admittedly, the acquisition of a part of the concerned mosques is not for purpose of any such conversion but is only for the purpose of widening the road.

CONTENTION NO. 3.

8. As regards the contention of the petitioners that the impugned orders are violative of the Resolution dated May 3, 1951 of Surat Municipal Corporation, it is required to be noted that the said resolution was passed when Surat had a municipality under the Municipal Boroughs Act. Thereafter the Surat Municipal Corporation was established under the BPMC Act. A perusal of the said Resolution of 1951 shows that it was not meant to be an all time prohibition on acquisition of religious places but it was meant to be one time resolution passed in the context of the road alignment which was being sanctioned on that particular occasion. This reading of the Resolution is justified by the language of the resolution which reads as under:

" Having considered the Standing Committee Resolution no.27 of 3.5.1951, this Board resolves to modify its resolution No.19 of and resolves that all the alignments as proposed by the Standing Committee be passed subject to the condition that alignment lines should be excluded from temples, mosques and other religious places which are used for prayer or worship. "

(emphasis supplied)

It may also be noted at this stage that the increase in the number of vehicles in Surat to about 4 lakhs (Times of India Ahmedabad Edition dated 5-4-1998) would also indicate that the situation in 1998 or for that matter even in 1995 is quite different from that prevailing in 1951.

CONTENTION NO. 4.

9. As far as the contention that the respondent Corporation has not followed the procedure under the provisions of the BPMC Act is concerned, in our view the said contention deserves to be rejected. The Standing Committee of the Corporation had passed resolution on 20th May 1989 after following the procedure prescribed under section 210 of the BPMC Act. A public notice was issued on 9th November 1988 inviting objections against the proposed road line and it was after considering the objections that the Standing Committee had taken the decision on 20th May 1989. Similarly the impugned decision under sec. 212 of the BPMC Act has been taken after considering the objections pursuant to the notices dated 7th September 1995. The procedure for inviting objections was already followed by the State Government under the T.P. Act before sanctioning the development plan and thereafter by the Surat Municipal Corporation under the provisions of Sections 210 and 212 of the Act. It, therefore, cannot be said that the procedure prescribed under the provisions of the relevant Statutes was not followed before the decision was taken to prescribe the road line in question so as to widen it from 40' to 60'.

CONTENTION NO.1:

10. As far as the first contention regarding the vires of the provisions of section 212 of the BPMC Act is concerned, it is required to be noted that the constitutional validity of the said provisions was upheld

by the Hon'ble Supreme Court in the case of Ahmedabad Municipal Corporation AIR 1972 SC 1730 (supra) and in the decision of a Division Bench of this Court rendered on December 13, 1972 in Special Civil Application No. 1454 of 1965. Mr.Mehta, however, submitted that both the aforesaid decisions were in the context of challenge to the provisions of Section 212 of the BPMC Act in the context of Articles 14, 19 and 31 of the Constitution and that the challenge centered round the controversy as to the right of the State to acquire private property and the right of the citizens to claim compensation but neither of the two decisions was concerned with the challenge on the touch stone of Articles 25 and 26 of the Constitution. Mr.Mehta contended that the protection under Articles 25 and 26 of the Constitution extends to a religious practice at a place of worship which forms an essential and integral part of the freedom of religion guaranteed by the aforesaid constitutional provisions.

11. Mr.Mehta pointed out that the impugned orders require demolition of, inter alia, a part of the prayer hall in each of the above two mosques. In order to explain and emphasize the importance of prayer hall, Mr.Mehta relied on a Manual of "Hadith" and particularly heavily relied on the following passage from the commentary in Chapter VII of the said Manual:

"The prayer service of Islam is essentially a congregational service and has besides the development of the inner self of man, through communion with God, other ends as well in view, which show what a unique force the Islamic prayer is in the unification of the human race. In the first place, this gathering of all people living in the same vicinity five times daily in the mosque, is a great help to the establishment of healthy social relations, the circle becoming wider in the Friday service, and still more extensive in the Id gatherings. But the jama a not only promotes social relations; what is far more important it levels down social differences. In the congregational prayer all Muslims stand shoulder to shoulder before their Maker, the king along with his poorest subject, the rich arrayed in costly robes with the beggar clad in rags, the white man along with his black brother. Nay, the king or the rich man standing in a back row is required to lay his head, when prostrating himself before God, at the feet of a slave or a beggar standing in the front row. There could be no greater levelling influence in the world. In

fact, congregational prayers are meant, among other things, to carry into practice the theoretical lessons of equality and fraternity for which Islam stands and however forcibly Ismail may have preached in words the equality of man and the fraternity of the community of Islam, all this would have ended in mere talk, had it not been translated into every day life through the institution of five daily congregational prayers.

The stress laid by the Holy Quran on jama'a is evident not only from the express command contained in v.1 : the very word used in it for the observance of prayers is evident that congregation is of the essence of prayer..."

12. Mr. Mehta then relied on the followinbg observations of the Hon'ble Supreme Court in the case of Mohd. S.Labbain Vs. Mohd. Hamif AIR 1976 SC 1569:

" It is well known that on special occasions like Fridays. Id, Ide-Milad and other auspicious the entire Muslim Community flock to the mosque for the purpose of offering prayers, because offering of prayers on such days is, according to the Islamic tenets, extremely auspicious and highly efficacious. It is also established from the evidence that the constructionsreferred to above had been made for the purpose of the mosque. Before a Mussalman offers his prayers he has first to wash his hands and feet in the prescribed manner and for this purpose arrangements are made in every mosque and Pallivasal is no exception. Accordingly a tank or Hauz where water was pumped in was meant for the purpose of Wazoo i.e. for washing hands and feet which is a prerequisite for offering the prayers. Similarly, as a large number of Muslims assembled on special occasions as mentioned above, the entire space including the mosque, the Mandapam, and the corridor was used for the purpose of offering prayers. Thus, these constructions were used for religious purposes incidental to the offering of prayers and have become accretions to the mosque so as to constitute one single entity. Similarly, the mats are meant for the Mohomedans to be used at the time of offering prayers. Lastly the loud speaker is used for reciting Azan and dcelivering Khutbas i.e. religious sermons. Thus, all the adjuncts of the mosque are meant for purely

religious purposes connected with the offering of prayers in the mosque."

13. It was submitted on behalf of the petitioners that if the road line is enforced by the respondent Corporation, as intended by them, a portion of the prayer hall (Jamat khana) will be required to be demolished in the Minarawali Masjid as well as in the Golwali masjid without any corresponding substantial benefit from the point of view of solving the traffic problem. Mr.Mehta submitted that about 41 shops admeasuring in all about 132 sq.mtrs around the two mosques, belonging to Respondents nos. 3 & 4 wakfs have already been demolished and therefore, the traffic problem has become much less acute and consequently if the prayer halls are kept in tact, no inconvenience or hardship will result to the public at large making use of the Bhagal main road.

14. It was also submitted on behalf of the petitioners that Minarawali masjid has a minaret which has its own significance as the said minaret is being used for giving call for prayers and also for spotting the moon on the eve of important festival days and it was therefore, submitted that the said minaret should also be as a part of the mosque and kept in tact.

15. Mr.Mehta submited that if the provisions of Section 212 of the Act are so interpreted as to empower the Corporation to acquire a place of religious worship, the same would be violative of the fundamental rights of the petitioners and other muslims in Surat under Articles 25 and 26 of the Constitution. In the alternative Mr.Mehta submitted that even if the provisions of Section 212 are held to be constitutional, the impugned orders must be held to be vitiated by the infirmity of breach of the provisions of Articles 25 and 26. In this connection Mr. Mehta invited our attention to the decision of the Hon'ble Supreme Court in the case of Dr.M.Ismail Faruqui Vs. Union of India & Ors(Ayodhya case). AIR 1995 SC 605, heavily relying on the following observations in paragraph 85 of the said judgment:

".... Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practice the religion, if the significance of that place be such..."

(emphasis supplied by Mr.Mehta)

Mr.Mehta submitted that there was no unusual and extraordinary situation in the instant case which would require demolition of the prayer hall and the minaret in the Minarawali Masjid or the prayer hall in the Golwali Masjid and that the requirement for widening a road for meeting with the traffic question cannot be said to be such unusual and extra ordinary situation as to justify demolition of any part of a place of religious worship.

16. On the other hand, Mr.Desai learned Counsel for the respondents contended that the ratio of the aforesaid judgment in the case of M.Ismail Faruqui (*supra*) is contained in the following principle laid down by the Hon'ble Supreme Court (para 85):

"85. The correct position may be summarized thus: Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse possession (See Mulla's Principles of Mahomedan Law, 19th Edn. by M.Hidayatullah - S.217 and AIR 1940 PC 116). If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. A mosque is not an essential part of the practice of the religion of Islam and Namaz (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practice the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any and

every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right."

(emphasis supplied by Mr.Desai).

17. In view of the aforesaid binding decision of the Apex Court, it would not be possible to accept the first contention of the petitioners that the provisions of Section 212 of the BPMC Act would not be applicable to any place of religious worship or that they are violative of Articles 25 and 26 of the Constitution. Nevertheless the provisions of Section 212 would have to be read subject to the provisions of Articles 25 and 26 of the Constitution.

18. The Hon'ble Supreme Court has already held in the above case that the acquisition of a religious place or a part thereof is not prohibited by the Constitution and therefore, a place of worship or a part there of can be acquired in the public interest for widening the road. In this connection it is necessary to note that the Hon'ble Supreme Court has also noticed that Art.25 does not necessarily include the right to acquire or own or possess property. Similarly, this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially than the other places of worship of that religion.

19. The Hon'ble Supreme Court has thus without giving any immunity from acquisition to a place of religion worship laid down the following principles:

(1)(a) If the place of worship of any religion has such particular significance for that religion that offering prayers at that particular place of worship is an essential and integral part of that religion, such a place stands on a higher footing and has to be treated differently and more reverentially than other places of worship of that religion.

(b). If the acquisition of such religious place (referred to in (a) above which is on a higher footing) results in extinction of right to practice the religion acquisition should not be resorted to.

(2). The question of any other religious place of worship (not referred to in (1) above) is to be made only in unusual and extraordinary situation for a larger national purpose.

20. In view of the aforesaid principles we have to examine the facts of the instant case. The petitioners have not been able to place any material on record to show that the Minarawali masjid or the Golwali Masjid has such particular significance for Islam that offering prayers at these particular mosques is an essential and integral part of the religion and therefore, it has to be treated differently or more reverentially than other places of worshipping Islam. In our view, therefore, the present case falls in the second category. The question then is whether the petitioners are justified in contending that the Corporation has not made out a case for acquiring a part of the mosques under consideration.

21. The Corporation or any local authority has the right to acquire any property including a place of religious worship, for the public purpose of widening a road. but is a place of religious worship entitled to be revered even by the State ?

The question that arises for our consideration is whether in such matters the concept of secularism embodied in our Constitution connotes mere religious neutrality, that is, does the Constitution forbid the State from giving reverence to a place of worship when such place is revered by a religious community. It is true that when the State offers employment in public services or grants public contracts, religion is an absolutely irrelevant consideration. So also when elections are being held to a public office, candidates are not supposed to canvas for votes by invoking

religious sentiments of the electorate; but this does not mean that when religion is so deeply embedded in the past, the State must treat a place of worship like any other private property such as a shop or a residential house, while acquiring the properties for a public purpose and that the State need not show any reverence to a place of worship. In our view, while secularism does forbid offer of public employment, grant of public largesse or election to a public office on the ground of religion, it not only permits but also expects the State to treat a place of worship with reverence or special consideration and treatment which other private properties may not command. This, in our view, is the Indian concept of secularism which is the foundation of the principles enunciated by the Hon'ble Supreme Court in the case of M.Ismail Faruqui (*supra*) which principles are deduced and enumerated in para 19 above.

22. Unfortunately some times there is a tendency to confuse the concept of secularism as if religion can have no place in temporal affairs. That view is based on the American doctrine of "the wall of separation between the Church and the State" which had arisen because of centuries long conflict between the Church and the State. However, the Indian experience as well as approach is quite different as is evident from the following decisions of our Supreme Court.

In the case of Ahmedabad St.Xavier College Society Vs. State of Gujarat, AIR 1974 SC 1389 (Para 75) the Hon'ble Supreme Court has recognized that while secularism eliminates God from the matters of State for the purpose of ensuring that no one shall be discriminated against on the ground of religion, the Constitution at the same time expressly guarantees freedom of conscience and the right freely to profess, practise and propagate religion; "the Constitution makers were conscious of the deep attachment the vast masses of our country had towards religion, the sway it had on their minds and the significant role it played in their lives."

In the case of Valsamma Paul (Mrs.) Vs. Cochin University and Others (1996) 3 SCC 545 the Hon'ble Supreme Court has propounded the positive concept of secularism in the following words:

"....pluralism is the keynote of Indian culture and religious tolerance is the bedrock of Indian secularism. It is based on the belief that all

religions are equally good and efficacious pathways to perform or God-realisation. It stands for a complex interpretative process in which there is a transcendence of religion and yet there is a unification of multiple religions. It is a bridge between religion in a multi-religious society to cross over the barriers of their diversity. Secularism is the basic feature of the Constitution as guiding principle of State Policy and action. Secularism in the positive sense is the cornerstone of an egalitarian and forward-looking society which our Constitution endeavors to establish. It is the only possible basis of uniform and durable national identity in a multi-religious and socially disintegrated society. It is a fruitful means for conflict-resolution and harmonious and peaceful living. It provides a sense of security to the followers of all religions and ensures full civil liberties, constitutional rights and equal opportunities."

The Apex Court has thus made it clear that our Constitution embodies the positive concept of secularism and has not accepted the American doctrine of secularism i.e. the concept of erecting "a wall of separation between Religion and State".

23. We may at this stage briefly examine why the understanding and implementation of the concept of secularism in India has been beset with difficulties. Various eminent academicians and social scientists in different fields, like Prof.P.K.Tripathi, Mr.Ashis Nandy, Mr.A.R.Blackshield have attempted to analyse the concept of secularism and its sources. There seems to be general consensus that there are two sources of the concept of secularism in India.

24. One source has been the liberal education of the west where the respect for religion is on account of respect for the liberty and dignity of the individual. Prof.P.K.Tripathi in "SECULARISM: CONSTITUTIONAL PROVISIONS AND JUDICIAL REVIEW" has propounded the following theory in this behalf:

" The fundamental rights in the Constitution of India including those concerning religion, were prompted by concern for the liberty, dignity and well being of the individual. Even the freedom of religion was guaranteed in this secular State not out of concern for religions, generally, much

less, for any particular religion, but solely and unmistakably out of concern for the individual, as an aspect of the general scheme of his liberty and as incidental to his well being. In this scheme of liberty there is guaranteed to the individual not only " freedom of religion", but where religion tended to become a menace to his liberty and dignity, there is also guaranteed to him "freedom from religion": because without the latter the former guarantee alone will be incomplete and even meaningless."

The constitution therefore, does not merely accept as guarantee right to religion to individual as well as to denominations, but the Constitution also provides for the State interventions for the reform of socio-religious traditions or to put it in other words, for abolition of social evils and discriminations that are perpetrated in the name of religion such as "Sati" "Devdasi system", "child marriage", "untouchability" and other caste based discriminations.

25. The other source of the Indian concept of secularism is the traditional Indian Society itself which has been accommodative and tolerant of various faiths or ways of life.(It is interesting to note that while the Western concept of secularism usually refers to the State's separation from or indifference towards "religion" and therefore, the antonym of "secular" is "religious" but in India, by contrast the antonym of "secular" is not "religious" but "communal".)

Mr.Nandy puts it this way - "The non-modern concept of religions as accommodative, tolerant faiths or ways of life was practised in exemplary manner by Ashoka, Akbar and Gandhi. They derived their religious tolerance not from secular politics but from Buddhism, Islam and Hinduism respectively..."

Mahatma Gandhi, the father of the Nation, maintained that not only Hinduism but all other religions have within them an inherent quest or yearning for a universal ethics of tolerance and that it can be an emancipatory resource in moral-political struggle against the untruth or political immorality of communal hatred and violence. Gandhiji in other words maintained that inter-religious harmony can be secured without requiring the people to give up their religiosity. Secondly, Gandhiji held the view that the modern state itself needed to be "civilized" by integrating it with spirituality or morality, which he believed can be

obtained through democratic-political engagements with the basic teachings of the different religions. (Please see "Indian Secularism and its Critics: Some Reflections" by Dr.Thomas Pantham).

26. While it is easier to think of pursuing or implementing the concept of secularism in modern India in terms of synthesis of the best in both the above traditions as if this could automatically follow from acceptance and understanding when both acceptance and understanding are themselves what are needed. We cannot merely build upon either of the traditions. By a creative visionary grasp of both, a new fabric must be woven out of the strands which they have to offer.

In this task, sociologist Mr. A.R.Blackshield states in "Secularism and Social control in the West ", thoughtful men of all professions and walks of life must join but law and education must still give the lead. Lawyers and Judges, as well as legislators and administrators, must seek a new degree of concrete, hardheaded, accurate focus on factual social issues; a constant search for objective relevancies to the core of dispute, rather than mere verbal echoes of dicta; an easy readiness for distinction and fragmentation of specialized rules and concepts, rather than escape into illusory synthesis under the guise of " harmonious construction"; - an easy readiness to change and change again, whenever the existing rules however well settled do not exactly fit the needs of the case.

27. In the process of exploring this change, we felt happy to note that in the case of Union of India and others Vs. B.C.Chaturvedi,(1995) 6 SCC 750, in a concurring judgment, Justice Hansaria has held in terms that the mere fact there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that the High Courts have not to do complete justice and if mounding of relief would do complete justice between the parties, the same cannot be ordered. The following concluding paragraph in the said judgment is worth reproducing:

"26. I had expressed my unhappiness qua the first facet of the case, as Chief Justice of the Orissa High Court in paras 20 and 21 of Krishna Chandra Pallai Vs. Union of India (AIR 1992 Ori. 261 (FB), by asking why the power of doing complete justice has been denied to the High Courts. I feel happy that I have been able to state, as a Judge of the Apex Court that the High

Courts too are to do complete justice. This is also the result of what has been held in the leading judgment"

(emphasis supplied)

28. We hold that while the Corporation does have the power to acquire a place of worship or a part thereof for the purpose of widening a road, it is expected to examine the need for such acquisition with reverence for a place of worship and consequently to examine the question whether the public need to acquire a particular place of worship or a part thereof overrides religious need to preserve that place of worship. Is the inconvenience to the general public so much that even a place of worship or a part thereof be demolished ? In a given case the extent of public hardship may justify acquisition of a place of worship; in another the public need may be pressing enough to justify acquisition of any other private property but not acquisition of the entire religious place or a part thereof, because the availability of a few square metres of additional road land may not give anything more than a mere symmetry. Of course, where the demands of vehicular and/or pedestrian traffic are so heavy, acquisition of a place of worship even in its entirety may be justified.

29. In short, in each case, it will be a question to be examined by the concerned local body assessing the public need for widening the road for catering to the increase in traffic, but always bearing in mind that in such matters religious neutrality means not the negative concept of indifference to religion but the positive concept of reverence for all religions. Here again the concerned authority has to undertake the above exercise without being influenced by the fact whether the place of worship belongs to one religious community or another. The idea of _____ (all religions are equal) will not be difficult to be achieved if one adopts it as _____ (all religions are mine).

30. Since we have already held that it is for the local body to consider the question in the aforesaid proper perspective, we would not have been required to examine the facts of the case on hand . In fact the preliminary contentions of Mr.Desai on the ground of delay, laches and acquiescence and absence of challenge to the decisions taken in 1988 and 1989 were urged as strong enough to justify refusal to entertain the petition itself; but as we are told that it is for the first time that a Constitutional Court has been

approached for directing the authority to strike a balance between the right of a religious community to its place of worship and the municipal needs of the society at large, we have, therefore, thought it fit to overrule the preliminary objections urged by Mr. Desai to demonstrate how the positive concept of secularism can be implemented in the facts of the present case, in order to discharge the duty to do complete justice as observed in the case of Union of India Vs. B.C. Chaturvedi (supra) as discussed in para 27 above. We would like to add that in future the balancing act undertaken herein must be left to the local authorities who would undoubtedly show due deference to the places of religious worship as earlier discussed in this judgment.

31. As far as the facts of the present case are concerned, there can be no gainsaying that in view of the increase in the population and traffic including explosion of vehicular traffic in all the growing cities in India, it has become necessary for the local authorities to take up the task of widening roads. The two mosques are situate on a junction of five roads. The width of the existing road is hardly about 40' and the sanctioned road line provides for the road line of 60'. It cannot, therefore, be said that the widening of the road by 20' would not be in public interest or in larger national interest.

32. As far as the minaret of Minarawali Masjid is concerned, the said structure is not being used for offering prayers or worship and therefore, it cannot be considered to be essential or integral part of the prayer much less of the religion nor can it be treated as having such particular significance that it can be permitted to override the wider public interest for the smooth movement of the traffic. In this connection it is necessary to note that the length of the structure supporting the minaret projects 18' into the sanctioned roadline and therefore the remaining portion of the road which would be available would be hardly about 42 feet wide including already existing road of width 40 feet. On a busy intersection of five roads, it can never be said that the widening of the road from 40' to 60' is not justified, though the traffic has increased many fold. In our view if the trustees of the wakf managing Minarawali masjid are required to remove the minaret portion, and the structure supporting it, it would not adversely affect offering prayers within the mosque and in any case the public interest in widening the road overrides the need, if any, of the religion to preserve the minaret.

33. However, as far as the acquisition of the other part of the Minarawali Masjid is concerned, the same involves acquisition of a part of the prayer hall (Jamatkhana) of the mosque which part admeasures about 30.27 sq.mts. That part falls in the strip having adjacent portion of the mosque being hauz (7.31 sq.mtrs) and Sahen (26.79 sq.mtrs) . All these portions shown in green colour in the map at Annexure "A" to this judgment form a strip which, even if excluded from the road lines will leave the road line of the width of about 56.1/2 feet as against sanctioned roadline of 60 feet width.

34. Having anxiously considered the facts of the case including the maps of the area in question and having heard the learned counsel as officers of the Court, we think that merely by acquisition of the said strip (in green colour) there would not be such gain to the public at large when a part of a place of religious worship including the prayer hall would be demolished for widening the road to the extent of about 3.1/2 feet especially when respondent no.3 i.e. the wakf managing the Minarawali Masjid has cooperated and demolished about 10 shops admeasuring 43.48 sq.mts. encircling the said mosque. It would therefore not be possible to say that the need of traffic would justify the demolition of any part of the said mosque which is shown in green colour in the map at Annexure "A"

35. Similarly, we have examined the map of the Golwali mosque (Annex B to the judgment) and heard the learned counsel for the parties and found that wakf managing the said mosque has removed about 19 shops admeasuring about 53 sq.mtrs. and made substantial portion of the land available to the Corporation for widening of the road and that enforcing the road line as sanctioned would involve demolition of a part of the prayer hall of the Golwali mosque which would yield only about 17.17 sq.mts. of land. The green strip in the map of this Majjid takes within it the aforesaid portion of the Jamatkhane and about 19 sq.mtrs of the remaining portion of the mosque. The needs of traffic would not justify demolition of the portion in green strip including the prayer hall of the Golwali mosque especially when the wakf has already made available substantial portion of land by demolishing about 19 shops admeasuring 53 sq.mts., encircling the Golwali mosque and when even a part of mosque admeasuring about 20 sq.mts. in pink can be demolished.

36. We would like to make it clear that both these

maps were prepared by the Corporation at the request of the Court and were shown to the learned counsel for the petitioners as well as respondents Nos. 3 and 4.

37. As far as the last contention of the petitioners regarding discriminatory treatment is concerned, we are afraid in exercise of the writ jurisdiction under Art.226 of the Constitution it would not be possible to examine such disputed questions of fact nor can they be examined in golden scale.

38. We would hasten to add that the principle laid down in this case is not intended to protect any place of worship construction of which was contrary to law or unauthorised in the first place. Respect by law for religion is not intended to be a one way street. There has to be mutual respect for each other.

39. In the result, the petition is partly allowed. The order dated 7th October 1995 (Annexure C to the petition) is quashed and set aside only in so far as the same requires respondent no.3 to remove a portion of prayer hall of Minarawali masjid shown in green colour in the map at Annexure "A" to this judgment (which includes the prayer hall). As far as the order dated October 7, 1995 at Annexure D to the petition is concerned,, the same is quashed and set aside only in so far as it requires respondent no.4 to demolish that portion of the Golwali Masjid which is shown in green colour in the map at Annexure "B" to this judgment (including the prayer hall). In other words, in the two maps, which are treated as a part of this judgment, the portion in green colour shall not be demolished. It will be open to the respondents to remove and acquire the constructed portion in pink colour.

40. Rule is accordingly made absolute only to the aforesaid extent with no order as to costs.

41. Before parting with the matter, we would like to place on record our gratitude and appreciation for the valuable assistance rendered to the Court by both late Mr.G.N.Desai and Mr.H.M.Mehta on this sensitive issue for resolving which we have made this humble endeavour.

Sd/- R.A.Mehta J.

Sd/- M.S.Shah J.

At the request of the petitioner, interim relief granted earlier to continue for a period of six weeks from today with a view to enable the petitioner to obtain further orders from the higher forum.

Sd/- R.A.Mehta J.

Sd/- M.S.Shah J.

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sharma